

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

BRANDON ASSOCIATES, LLC,
Plaintiff,

v.

FAILSAFE AIR SAFETY SYSTEMS CORP.,
Defendant/Plaintiff-in-Counterclaim

v.

DONALD B. FLANAGAN, in this individual
capacity,
Defendant-in-Counterclaim

Civil Action No. 04-12013 NMG

AFFIDAVIT OF LAURIE M. RUSKIN, ESQ.
IN SUPPORT OF FAILSAFE'S MOTION FOR SANCTIONS

I, *Laurie M. Ruskin*, hereby depose and swear as follows:

1. I am an attorney in good standing in the Commonwealth of Massachusetts and Of Counsel to *Sweder & Ross LLP*, counsel in the above-captioned matter for the Defendant, *Failsafe Air Safety Systems Corp.* ("Failsafe").

2. I have personal knowledge of the facts contained herein, am over the age of 18 years, and am competent to testify.

3. Due to misconduct and bad faith of Plaintiff, *Brandon Associates, Inc.* ("Brandon"), in prosecuting this action – both procedurally (resulting in a number of violations of the Federal Rules of Civil Procedure) and substantively – Failsafe was faced with a host of unnecessary and harassing motions, multiple complaints and amended complaints filled with frivolous and unsubstantiated allegations (much of which Brandon later dropped once it finally retained outside counsel, as opposed to its in-house counsel, to prosecute its claims).

4. This pattern of conduct not only ignored the Rules of Civil Procedure but prejudiced Failsafe's ability to defend itself and protect its interests. Failsafe was forced to expend needless hours defending itself which proved to be time consuming and costly.

5. Attached to this Affidavit is a true and accurate copy of a print out of the itemized billing time entries for Failsafe from *Sweder & Ross LLP* and for which Failsafe was billed. It represents primarily my legal work (identified by the initials "LMR"), as well as the legal work of my colleague, Kenneth A. Sweder, Esq. (identified by the initials "KAS"). Failsafe was billed at our firm's normal hourly rate of \$250.00/hour for me and \$425.00/hour for Attorney Sweder.

6. Brandon filed an Amended Complaint which contained and/or or added frivolous, unsubstantiated and extraneous allegations, claims and new defendants (one of whom was added for the sole purpose of defeating diversity). All of these claims and new defendants were eventually dropped when Brandon replaced its inexperienced and/or incompetent in-house counsel with an experienced, outside litigator. The Amended Complaint was also not filed and served in conformity with the Rules of Civil Procedure which caused Failsafe to needlessly file an Answer to Brandon's original Complaint and, later, a motion to strike Brandon's unnecessary motion to amend in order to protect its interests. The legal work billed to and paid by Failsafe for this unnecessary time was \$4,827.50. *See* time entries for September 27, 2004 (\$125.00 for LMR, \$127.50 for KAS); September 28, 2004 (\$375.00 for LMR, \$255.00 for KAS); September 29, 2004 (\$625.00 for LMR); September 30, 2004 (\$450.00 for LMR, \$127.50 for KAS); October 1, 2004 (\$25.00 for LMR); October 4, 2004 (\$340.00 for KAS, \$1,250.00 for LMR); October 5, 2004 (\$425.00 for LMR, \$425.00 for KAS); October 20, 2004 (\$25.00 for LMR); October 22, 2004 (\$127.50 for KAS, \$125.00 for LMR).

7. Brandon improperly attached to its Amended Complaint confidential and proprietary materials belonging to Failsafe. Failsafe objected to this breach of confidentiality and Brandon

commenced a nonsensical effort (by filing a motion to redact) to redact portions of same and re-filing the pleading. The legal work billed to and paid by Failsafe for this unnecessary time was \$1,887.50. *See* time entries for October 6, 2004 (\$350.00 for LMR); October 7, 2004 (\$400.00 for LMR); October 8, 2004 (\$325.00 for LMR); October 11, 2004 (\$225.00 for LMR); October 12, 2004 (\$200.00 for LMR, \$127.50 for KAS); October 13, 2004 (\$150.00 for LMR, \$85.00 for KAS); October 25, 2004 (\$25.00 for LMR).

8. Brandon's response to Failsafe's motion to strike was so egregious (i.e., claiming essentially that its motion to amend its Complaint was, in fact, *not* a motion to amend and that Brandon intended to file an amended Complaint as a matter of right) that Failsafe was compelled again to respond to protect its interests. The legal work billed to and paid by Failsafe for this unnecessary time was \$525.00. *See* time entries for October 19, 2004 (\$250.00 for LMR); October 21, 2004 (\$75.00 for LMR); October 28, 2004 (\$175.00 for LMR); October 30, 2004 (\$25.00 for LMR).

9. Brandon failed to respond to Failsafe's Counterclaims in a timely manner causing Failsafe to file a series of further unnecessary motions and responses to Brandon's motions to, again, protect its interests. The legal work billed to and paid by Failsafe for this unnecessary time was \$2,412.50. *See* time entries for October 28, 2004 (\$1,325.00 for LMR, \$127.50 for KAS); November 2, 2004 (\$25.00 for LMR); November 3, 2004 (\$100.00 for LMR); November 5, 2004 (\$90.00 for LMR); November 10, 2004 (\$85.00 for KAS); November 11, 2004 (\$625.00 for LMR); November 16, 2004 (\$75.00 for LMR).

10. The legal work billed to Failsafe for the drafting of this Affidavit and the Motion for Sanctions it supports is \$6,402.50. *See* time entries for June 17, 2005 (\$962.50 for LMR); June 21, 2005 (\$302.50 for LMR); June 23, 2005 (\$550.00 for LMR); July 7, 2005 (\$1,100.00 for LMR); July 18, 2005 (\$27.50 for LMR); July 21, 2005 (\$27.50 for LMR); July 25, 2005

(\$302.50 for LMR, \$425.00 for KAS); July 27, 2005 (\$632.50 for LMR, \$382.50 for KAS); July 28, 2005 (\$1,045.00 for LMR); July 29, 2005 (\$220.00 for LMR, \$425.00 for KAS).

11. Accordingly, Failsafe incurred legal fees of \$16,055.00.

12. In addition, there were routine operating costs incurred by Failsafe in the amount of approximately \$642.20.¹

13. Total attorney fees and costs incurred by Failsafe for Brandon's conduct is \$16,697.20.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS 3rd DAY OF AUGUST, 2005.

s/Laurie M. Ruskin

Laurie M. Ruskin

CERTIFICATE OF SERVICE

I hereby certify that I caused a true copy of the above document to be served upon the attorney of record for each of the other parties in this action by U.S. mail this 3rd day of August, 2005.

s/Laurie M. Ruskin

Laurie M. Ruskin

¹ *Sweder & Ross LLP* does not itemize its routine costs. Instead, it adds 4% to its legal fees to cover all standard operating costs.

SWEDER & ROSS LLP
21 Custom House Street, Suite 300
Boston, MA 02110
617-646-4466

August 03, 2005

Invoice submitted to:

Failsafe Air Safety Systems Corp.
 79 Fillmore Avenue
 Tonawanda, NY 14150-2335

In Reference To: Brandon Associates, LLC

Professional Services

	<u>Hours</u>
9/27/2004 - KAS Telephone conference with L. Ruskin regarding latest pleading filed by Brandon Associates.	0.30
- LMR Telephone conference with A. Feuerstein regarding Answer and other responsive pleadings, service of additional pleadings from Plaintiff; telephone conferences with K. Sweder regarding service and filing of additional pleadings; draft e-mail correspondence to A. Feuerstein.	0.50
9/28/2004 - KAS Telephone conferences regarding litigation strategy.	0.60
- LMR Telephone conference with A. Feuerstein regarding Answer and other responsive pleadings; telephone conference with K. Sweder regarding same; review Amended Complaint and Rule 11 letter.	1.50
9/29/2004 - LMR Review Answer, Affirmative Defenses and Counterclaim; revise and edit same; Telephone conferences with Attorney Feuerstein on same; Office conferences with K. Sweder, J. Hofmann regarding response to Complaint, Amended Complaint.	2.50
9/30/2004 - LMR Telephone conferences and e-mail correspondence regarding filing of Answer, edits to Answer, electronic filing notices from Court; continue revisions on Counterclaim.	1.80
- KAS Telephone conferences regarding filing of pleadings in U.S. District Court.	0.30

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		<u>Hours</u>
10/1/2004 - LMR	Review electronic filing notice from Court; commence drafting of Motion to Strike and for Sanctions; review and compare Amended Complaint to Complaint.	0.10
10/4/2004 - KAS	Review of pleadings; conference with L. Ruskin regarding same; e-mails regarding Motion to Dismiss and request for sanctions.	0.80
- LMR	Continue drafting Motion to Strike and for Sanctions; legal research regarding same; office conference with K. Sweder on same and on Answer; e-mail correspondence with A. Feuerstein.	5.00
10/5/2004 - KAS	Review of latest pleadings; telephone conference with L. Ruskin and A. Feuerstein regarding Motion to Strike and for Sanctions and regarding various pleadings and strategy.	1.00
- LMR	Telephone conferences with K. Sweder, A. Feuerstein, regarding Motion to Strike; revise and edit same; telephone conferences regarding filing of same, Court docketing error, electronic filing; telephone conference with Clerk to Judge Gorton regarding correcting docketing error, electronic filing; telephone conference regarding re: new filings by Plaintiff; voicemail from R. Wilson, co-defendant's counsel.	1.70
10/6/2004 - LMR	Telephone conference with A. Feuerstein regarding Plaintiff's Motion to Redact and service of Motion to Amend and Amended Complaint; review of same; telephone call to and conference with R. Wilson regarding update on case and strategy.	1.40
10/7/2004 - LMR	Review fax from Legalmetric, Motion to Redact and Investor Overview; telephone conference with A. Feuerstein regarding strategy and response to same and regarding telephone conference with R. Wilson; legal research regarding breach of confidentiality agreements.	1.60
10/8/2004 - LMR	Commence drafting of response to Motion to Redact.	1.30
10/11/2004 - LMR	Finish drafting of response to Motion to Redact.	0.90
10/12/2004 - KAS	Review of Opposition to Motion to Redact and arrangements regarding filing of same; telephone conference with L. Ruskin.	0.30
- LMR	Review and revise response to Motion to Redact; telephone conference regarding filing of same; review cover letter to opposing counsel; e-mail correspondence with A. Feuerstein regarding same.	0.80

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	<u>Hours</u>
10/13/2004 - KAS Telephone regarding litigation strategy.	0.20
- LMR Telephone conference with K. Sweder regarding update regarding case; telephone conference with A. Feuerstein regarding response to Motion to Redact; strategize on case; review correspondence from A. Feuerstein.	0.60
10/19/2004 - LMR Review opposition to motion to strike; review voicemail from R. Wilson.	1.00
10/20/2004 - LMR Telephone conference with R. Wilson.	0.10
10/21/2004 - LMR Telephone conference with A. Feuerstein regarding opposition to motion to strike; strategize regarding same.	0.30
10/22/2004 - KAS Telephone conference with L. Ruskin regarding status and strategy.	0.30
- LMR Telephone conference regarding service of amended complaint to proposed defendants; telephone conference with K. Sweder regarding update on case.	0.50
10/25/2004 - LMR Review service of another amended complaint.	0.10
10/28/2004 - KAS Office conference regarding motion to default.	0.30
- LMR Telephone call to and conference with S. Silveira regarding follow-up to Rule 11 letter and procedural issues with case; draft Request for Default and supporting Affidavit; draft reply to Plaintiff's response to motion to strike and for sanctions.	5.30
- LMR Review and revise Reply; e-mail correspondence and telephone conferences with K. Sweder regarding court filings, reply.	0.70
10/30/2004 - LMR Review e-mail correspondence from A. Feuerstein.	0.10
11/2/2004 - LMR Telephone conference regarding service of Motion for Leave to File Reply To Counterclaims.	0.10
11/3/2004 - LMR Review Motion for Leave and supporting documents.	0.40
11/5/2004 - LMR Review Rule 11 letter from S. Silveria; telephone conference with A. Feuerstein regarding Motion for Leave, service of pleading on defendants; Strategize on response.	0.20
11/10/2004 - KAS Review of pleadings and order.	0.20

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	<u>Hours</u>
11/11/2004 - LMR Draft opposition to Plaintiff's motion for leave to file reply to counterclaims.	2.50
11/16/2004 - LMR Review reply to request for default; telephone conference regarding service of motion for sanctions.	0.30
6/17/2005 - LMR Drafting of Motion for Sanctions.	3.50
6/21/2005 - LMR Continue drafting of Motion for Sanctions; review e-mail from P.Chirayath regarding drafting of answers to interrogatories.	1.10
6/23/2005 - LMR Continue drafting of Motion for Sanctions.	2.00
7/7/2005 - LMR E-mail correspondence and telephone conference with P. Chirayath; final review and editing of Answers; draft cover letter for service same; e-mail correspondence and telephone conferences on same; draft Affidavit in support of Motion for Sanctions; telephone conference regarding determining fees and costs for Motion for Sanctions; review time billings for same; review and edit Motion; forward same with e-mail correspondence to K. Sweder.	4.00
7/18/2005 - LMR Office conference with K. Sweder regarding review of motion for sanctions.	0.10
7/21/2005 - LMR Telephone conference with K. Sweder regarding review of motion for sanctions.	0.10
7/25/2005 - KAS Review of motion for sanctions and memorandum in support; telephone conference with L. Ruskin regarding same.	1.00
- LMR Review Motion for Sanctions; telephone conference with K. Sweder on same; revise same and forward to K. Sweder.	1.10
7/27/2005 - LMR Review and revise Affidavit in support of Motion for Sanctions; revise Motion for Sanctions.	2.30
- KAS Review of pleadings regarding motion for sanctions; telephone conference with L. Ruskin regarding same.	0.90
7/28/2005 - LMR Continue revision of Affidavit in support of and Motion for Sanctions; e-mail correspondence to office on same.	3.80
7/29/2005 - LMR Forward revised Motion for Sanctions and Affidavit to office with e-mail correspondence on same; telephone conference with K. Sweder regarding edits to Motion for Sanctions and Affidavit; review and edit same; telephone call to office on same.	0.80

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	<u>Hours</u>
7/29/2005 - KAS Review and modification of latest draft of motion for sanctions; review of revised Affidavit for Sanctions; telephone conference with L. Ruskin regarding same.	1.00

	<u>Amount</u>
For professional services rendered	57.30 \$16,055.00